IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1139

IVY LANDRETH,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ELMER W. FREYTAG,
KENNETH B. HAWKINS,
Attorneys for Wabash Railroad Company, Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

Table of Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1139.

IVY LANDRETH,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Presiding Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is not reported. The judgment, however, appears at page 20 of the record. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 153 F. (2d) 98. (R. 34-39.)

STATEMENT OF THE CASE.

The petitioner's presentation of the subject matter and issue involved is incomplete and requires clarification.

The statement in the petition neglects to point out that in the suit commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, the respondent herein originally pleaded several defenses and averred that at the time and place of the occurrence on August 18, 1942 the respondent was doing a general railroad business in Piatt County, Illinois and maintained, operated and conducted its business under and subject to the terms and provisions of the Workmen's Compensation Act of Illinois, and that the injuries alleged to have been sustained by the petitioner were accidental injuries which arose out of and in the scope of his employment, and that his only remedy was under the Workmen's Compensation Act of Illinois. (R. 4.)

The parties to the suit commenced in the District Court and in the proceedings before the Industrial Commission of Illinois were identical and the issue was identical. (R. 13.)

In its application to the Industrial Commission respondent asked for the appointment of an arbitrator to make inquiries and hear such proper evidence as the parties might submit, and that an award and decision be made in conformity with the Workmen's Compensation Act. (Ill. Rev. Stat., State Bar Ass'n. Ed., 1943, Chap. 48, Par. 139, Sec. 3, and Par. 156, Sec. 19.) (R. 8.) Considerable testimony was introduced before the arbitrator and a correct stenographic report of the evidence was filed in connection with the petition for review of the award by the full Indus-

trial Commission. Further proceedings were had before the Commission on review and a decision rendered finding that the parties were operating under and subject to the provisions of the Workmen's Compensation Act, and further finding that petitioner sustained accidental injuries which arose out of and in the course of his employment, for which substantial compensation was awarded. (R. 10.)

Petitioner's statement of the case fails to show that petitioner appealed from this decision of the Industrial Commission to the Superior Court of Cook County, a court of general jurisdiction, and that that court quashed petitioner's writs of certiorari and *scire facias* and dismissed the proceedings. (R. 11-12.) This order of the Superior Court was an appealable order. Petitioner, however, did not attempt to reverse this order by suing out a writ of error from the Supreme Court of Illinois to the Superior Court of Cook County. The decision of the Industrial Commission therefore became final and enforceable as a judgment under the Workmen's Compensation Act. (R. 12.) The omission to set forth these material facts improperly presents the question involved in the petition to this Court for a writ of certiorari.

The respondent's sixth defense consisting of a plea of *res judicata* (filed in and by leave of the District Court of the United States after the decision of the Industrial Commission of Illinois had become final and binding) averred in detail all the proceedings, findings, and decisions before the Industrial Commission and the Superior Court of Cook County. (R. 8-14.) Petitioner filed a motion to strike this plea, which motion the District Court overruled. (R. 14.) Thereupon petitioner elected to stand upon his said motion, thereby admitting the allegations of the sixth

defense to be true. (R. 15, 19-20.) This defense averred among other things,

> "that the issue of whether at the time and place of the said accident the said Wabash Railroad Company and Ivy Wayne Landreth were engaged in intrastate commerce and subject to the terms and provisions of the Workmen's Compensation Act of Illinois, or engaged in interstate commerce and subject to the terms and provisions of the Federal Employers' Liability Act, was the issue before the Industrial Commission of Illinois, and is the same issue now pending before this Court, and it has been finally and definitely determined and adjudicated by the Industrial Commission of Illinois that the said Wabash Railroad Company and Ivy Wayne Landreth at the time and place of the alleged accident and resulting injuries on the 18th day of August, 1942, were engaged in intrastate commerce and subject to the terms and provisions of the Workmen's Compensation Act of Illinois, which said adjudication and determination is in full force and effect and has not been reversed." (R. 13.)

Had these averments not been true, the proper procedure was for petitioner to file a reply thereto instead of electing to stand on his motion.

SUMMARY OF ARGUMENT.

I.

The issue in this litigation is whether the Circuit Court of Appeals was correct in affirming the judgment of the District Court holding that the respondent's plea of *res judicata* was good.

Petitioner's contention that the Circuit Court of Appeals was in error in holding that the decision in *Chicago, R. I. & P. R. Co.* v. *Schendel,* 270 U. S. 611; 70 L. Ed. 757, was determinative of the question at issue, is not well taken.

The argument that the Industrial Commission of Illinois did not make a specific finding that the parties were engaged in intrastate commerce is beside the point since the only question at issue is whether the averments of the plea of *res judicata,* admitted by petitioner to be true, were sufficient. The plea specifically states that the Industrial Commission finally and definitely determined and adjudicated that the parties were at the time and place of the accident engaged in intrastate commerce and subject to the Workmen's Compensation Act.

Moreover, petitioner's argument with respect to the sufficiency of the award of the Industrial Commission is in any event without merit because the issue presented to the Commission necessarily required a determination of whether or not the parties were engaged in intrastate or interstate commerce.

The argument that the opinion on the *Hope* claim in the *Schendel* case is inapplicable because the decision of the Industrial Commission in the case at bar had not ripened into a final award is contrary to the facts. The plea sets

forth that petitioner sought to have the decision of the Industrial Commission reviewed by the Superior Court of Cook County and that that court entered an order dismissing the proceedings and petitioner did not attempt to reverse this order by suing out a writ of error from the Supreme Court of Illinois.

II.

There is no conflict in the decision of the Circuit Court of Appeals and the decisions of the Supreme Court of Illinois. The Illinois decisions cite with approval and follow the *Schendel* case which the Circuit Court of Appeals held was determinative of the case at bar.

ARGUMENT.

The question presented by this petition for writ of certiorari is whether or not a decision of the Industrial Commission of Illinois awarding compensation to an injured employee may be successfully pleaded as *res judicata* in a suit involving the same parties and the same issue, upon that decision becoming final and enforceable as a judgment as a result of a court of general jurisdiction entering an order dismissing the proceedings to review the said decision, from which order no writ of error from the Supreme Court of Illinois was sought.

Petitioner evidently seeks to have this Court review the decision of the Circuit Court of Appeals affirming the judgment of the District Court sustaining such plea of *res judicata* on the grounds, first, that the question has not been decided by this Court; and, second, that there is a conflict in the decision of the Circuit Court of Appeals and the decisions of the Supreme Court of Illinois. We shall answer these contentions in the order named.

I.

The Averments in Respondent's Plea of Res Judicata Bring This Case Squarely Within the Decisions of This Court.

The averments contained in respondent's sixth defense to the complaint setting up the plea of *res judicata* appear in the record at pages 8 to 14 inclusive. Certain salient parts thereof, omitted by petitioner in his statement of the case, appear at pages 2 to 4 of this brief.

In passing upon the *Hope* claim in the case of *Chicago,*

R. I. & P. R. Co. v. *Schendel,* 270 U. S. 611; 70 L. Ed. 757, this Court said at page 615:

> "* * * A judgment is as binding upon an unwilling defendant as it is upon a willing plaintiff. Nor is it material that the action or proceeding, in which the judgment, set up as an estoppel, is rendered, was brought after the commencement of the action or proceeding in which it is pleaded."

The Court continued at page 616:

> "It is urged on behalf of respondent, that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in intrastate commerce, the state law is supreme. *Judicial power to determine the question in a case brought under a state statute is in no way inferior or subordinate to the same power in a case brought under the federal act.*"
>
> "The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute (Workmen's Compensation Act), cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as *res judicata.*" (Italics supplied.)

Petitioner seeks to avoid this decision by arguing, (1) that the Industrial Commission of Illinois did not make a specific finding that the parties were engaged in intrastate commerce; and (2) that the decision of the Industrial Commission had not ripened into a final award.

The argument on the first ground is beside the point because it ignores the fact that the question at issue is whether the averments of the plea of *res judicata* were sufficient. Petitioner improperly tries to avoid the effect of the plea, the averments of which he has admitted to be true, by going outside the plea.

By standing on his motion to strike the plea, petitioner has admitted that the parties and issue were the same, that testimony and evidence on the issue of whether the parties were engaged in intrastate commerce and subject to the Workmen's Compensation Act of Illinois or engaged in interstate commerce and subject to the Federal Employers' Liability Act had been introduced before the Industrial Commission, and that said Commission had definitely and finally determined and adjudicated that the parties were engaged in intrastate commerce and subject to the Workmen's Compensation Act of Illinois. Petitioner at page 9 of his brief says:

> "The plea avers that the issue before the Industrial Commission was whether the petitioner and respondent were engaged in intrastate commerce or interstate commerce, but it does not appear in the plea that that issue was decided by the Commission. In order for the plea to be a bar, it must aver that the Commission found that the petitioner was engaged in intrastate commerce."

and at page 10 of his brief says,

> "In order to render the award a bar as *res judicata*, it would be necessary that the plea aver that the Industrial Commission found that the petitioner was engaged in intrastate commerce. The plea should have averred not only the precise question, but it should further have averred that the Industrial Commission decided the question."

Petitioner thus admits that if the plea in the case at bar contained this averment it would be a good plea of *res*

judicata. That is exactly what the plea does contain. It states,

> "* * * it has been finally and definitely determined and adjudicated by the Industrial Commission of Illinois that the said Wabash Railroad Company and Ivy Wayne Landreth at the time and place of the alleged accident and resulting injuries on the 18th day of August, 1942, were engaged in intrastate commerce and subject to the terms and provisions of the Workmen's Compensation Act of Illinois, which said adjudication and determination is in full force and effect and has not been reversed." (R. 13.)

Moreover, petitioner's argument with respect to the sufficiency of the Industrial Commission's award is in any event without merit. The primary issue presented to the Industrial Commission necessarily required a determination of whether or not the parties were engaged in intrastate Commerce or interstate commerce. Abundant testimony on that question was heard by the Commission. Unless the Industrial Commission determined that the accident arose in intrastate commerce it could have no jurisdiction and could enter no award in favor of the injured employee under the Workmen's Compensation Act of Illinois. (Ill. Rev. Stat., State Bar Ass'n Ed. 1943, Chap. 48, Par. 139, Sec. 3, Par. 142, Sec. 5.)

The Industrial Commission found that the parties were operating under and subject to the provisions of the Workmen's Compensation Act and that the employee sustained accidental injuries which arose out of his employment and awarded him full compensation, including medical attention and a pension for life. (R. 10.) By this award it necessarily followed that the Commission determined that the parties were engaged in intrastate commerce and not interstate commerce. The decision of the Industrial Commission instead of disclosing a lack of jurisdiction so as to render the award void, shows that it had proper jurisdic-

tion, in view of the recital in the decision that the parties were operating under and subject to the provisions of the Workmen's Compensation Act, and that the employee was entitled to compensation under the specific provisions of the Act. It was not necessary that the Commission should spell out anything more in its decision. (*Hagens* v. *United Fruit Co.*, 135 F. (2d) 842; *Wors* v. *Tarlton*, 95 S. W. (2d) 1199.)

The argument on the second ground is also without merit. Whether the decision was right or wrong upon the question of fact before the Industrial Commission, it became final and conclusive as to the matters adjudicated thereby and is impregnable to collateral attack. In the case of *Dennison* v. *Payne*, 293 F. 333 referred to with approval by this Court in the *Schendel* case, the court says at page 341:

> "As the Workmen's Compensation Board had authority to make an award for injuries inflicted upon persons employed in intrastate commerce, it had necessarily jurisdiction to determine whether an injury complained of occurred in intrastate or in interstate commerce. In making its decision, its award would not be void. If erroneous, its decision would simply be voidable, to be corrected by writ of error or appeal. *Its award has the effect of a judgment of a court of competent jurisdiction, no appeal having been taken therefrom.*" (Italics supplied.)

The case at bar is even stronger in that the Superior Court of Cook County entered an order dismissing the proceedings by which petitioner sought to review the decision of the Industrial Commission and petitioner did not attempt to reverse this order by suing out a writ of error from the Supreme Court of Illinois. (R. 12.) This situation is entirely different from that in the *Elder* claim in the *Schendel* case relied on by petitioner at page 12 of

his brief. The *Elder* claim had been heard only by the Deputy Commissioner and was still pending on review before the Commissioner himself, so that far from being a final and enforceable award, the matter had not yet been completed by the Commission.

This Court has also held in the recent case of *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430; 88 L. Ed. 149 that a final award of an Industrial Commission is a "judicial proceeding" or "record" within the meaning of the full faith and credit clause and the Act of Congress, and may be pleaded as *res judicata.* The Court says at page 443:

> "Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a 'judicial proceeding,' or its award is a 'record' within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have 'such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

We submit, therefore, that the facts in the case at bar fall squarely within the decision of this Court on the *Hope* claim in the case of *Chicago, R. I. & P. R. Co.* v. *Schendel,* 270 U. S. 611. That decision is decisive of the case at bar and answers petitioner's first contention that the question presented has not heretofore been passed upon by this Court.

II.

There is No Conflict in the Decision of the Circuit Court of Appeals and the Decisions of the Supreme Court of Illinois.

The case of *Michelson* v. *Industrial Commission,* 375 Ill. 462, cited by petitioner at page 10, has nothing to do with the question of *res judicata* and in no way supports petitioner's contention that the decision of the Circuit Court of Appeals conflicts with the decisions of the Supreme Court of Illinois. The quotation in petitioner's brief is taken from the earlier decision of *Trigg* v. *Industrial Commission,* 364 Ill. 581, in which the Court says at page 584:

> "The findings of the Commission are in a sense akin to judicial proceedings. (Citing cases.) * * * The arbitrator found the applicant's disability was not the result of an accident which arose out of and in the course of his employment. No attempt was made by the applicant to review that finding. It therefore, under the statute, became the finding of the Industrial Commission. Later the employee died. His widow filed an application for compensation, asserting that her husband received an injury in the course of and arising out of his employment which caused his death. The injury alleged was the same purported injury which had been the basis of the claim made by decedent in his lifetime. * * * We there held that the decision of the Commission was final and conclusive and could not later be reviewed by it upon the widow's petition. *Cases from other jurisdictions which hold that the doctrine of res adjudicata applies to the awards of industrial commissions the same as to judgments at law are*: *Chicago, Rock Island and Pacific Railroad Co.* v. *Schendel,* 270 U. S. 611, 70 L. Ed. 757; *Kalinick* v. *Collins Co.,* 116 Conn. 1, 163 Atl. 460; *Pruitte* v. *Ocean Accident and Guarantee Corp.* (Tex.), 40 S. W. (2d) 254, 58 S. W. (2d) 41; *Karny* v. *Northwestern Malleable Iron Co.,* 160 Wis. 316, 151 N. W. 786; *Hurst* v. *Independent Const. Co.,* 136 Kan. 583,

16 Pac. (2d) 540; *United States Fidelity and Guaranty Co.* v. *Industrial Com.*, 42 Ariz. 422, 26 Pac. (2d) 1012; *Reinhart & Donovan* v. *Dean*, 16 Pac. (2d) (Okla.) 85." (Italics supplied.)

This decision shows clearly that the Supreme Court of Illinois cites with approval and follows the *Schendel* case, which the Circuit Court of Appeals held was determinative of the case at bar.

The decisions of *Svalina* v. *Saravana*, 341 Ill. 236 and *City of Geneseo* v. *Ill. N. Utilities Co.*, 378 Ill. 506, cited at page 11, likewise do not support petitioner's contention. The facts in those cases are in no way applicable to the case at bar. The quotations announce a correct principle of law. The case at bar comes squarely within the principle announced, in that it "appears upon the face of the record" as shown by the averments in the defendant's sixth defense setting up a plea of *res judicata*, that "the precise question was raised and determined" between the same parties and that this determination became final and ripened into a judgment from which no appeal was successfully taken. (R. 13.)

Conclusion.

For the reasons stated we respectfully submit that the question presented by this petition for writ of certiorari has heretofore been determined by this Court adversely to the petitioner's contention, and that the decision of the Circuit Court of Appeals is in conformity with the law as announced by this Court and with the decisions of the Supreme Court of Illinois. We therefore ask that the petition for writ of certiorari be denied.

Respectfully submitted,

ELMER W. FREYTAG,
KENNETH B. HAWKINS,
Attorneys for Wabash Railroad Company, Respondent.

IN THE

Supreme Court of the United States

Term, 1946.

No. 1139

IVY LANDRETH,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C.I.O.

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

TABLE OF CONTENTS

TABLE OF CASES CITED

ACT CITED

IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1946.

No.

IVY LANDRETH,

Petitioner,

VS.

WABASH RAILROAD COMPANY,

Respondent.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ivy Landreth, by his attorneys, has prayed that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit en-

tered in the above entitled case on January 18, 1946. The United Railroad Workers of America, C.I.O., ask leave to file a brief, amicus curiae, because this case, factually, pointedly presents the necessity of now adopting the dissenting opinion of the late Mr. Justice Brandeis in the case of N. Y. CENTRAL R. R. v. WINFIELD, 244 U. S. 147, 154, in preference to the majority opinion filed in that case, pertaining to the Federal Employers Liability Act, April 22, 1908, c. 149; 35 Stat. 65; and amendments thereto, U. S. C. A., Title 45, sec. 51, et seq., as the *exclusive* remedy of railroad employees injured in interstate commerce; particularly in view of the amendment of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, which has now placed practically every railroad employee within the purview of the Federal Employers Liability Act.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals is reported in 153 F. (2d) 98.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of the Federal Employers Liability Act, 45 U. S. C. A. 51.

The judgment of the Circuit Court of Appeals sought to be reversed was entered January 18, 1946. The petition for rehearing was denied on February 7, 1946. The opinion is reported in 153 F. (2d) 98.

QUESTION PRESENTED.

Does the existence of a remedy under the Federal Employers Liability Act exclude a right of action under the Illinois Workmen's Compensation Act?

STATUTES INVOLVED.

Workmen's Compensation Act, Illinois Rev. Stat., Chap. 48, Sections 14, 5, the latter section of which provides:

> "Employees shall not be included within the provisions of this Act when excluded by the laws of the United States relating to liability of employers to their employees for personal injuries where such laws are held to be exclusive."

The Federal Employers Liability Act as amended, 45 U. S. C. A. 51, which provides, in part, as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter."

STATEMENT OF FACTS.

The petitioner had been employed by the respondent as a carpenter in the bridge and building department, having to do with the building and maintenance of buildings essential to the movement of interstate transportation. While engaged in this work, he was injured.

Suit was instituted under the Federal Employers Liability Act to recover damages for injuries arising out of negligence. In the complaint it was averred that the parties were engaged in interstate commerce. Nine months later the railroad company *of its accord* filed an application with the Industrial Commission of Illinois asking it to adjudicate the claim of the petitioner for injuries that occurred while at work.

The petitioner contended that his injury was sustained while engaged in interstate commerce and that, therefore, under the Illinois statute, the Commission had no jurisdiction of the matter. The Commission, however, made an award to the petitioner of compensation under the Illinois statute. Thereafter an appeal was taken by the petitioner from the action of the Commission to the Superior Court of Cook County, Illinois. The Superior Court dismissed the appeal and affirmed the action of the Commission. No appeal was taken to the Supreme Court of Illinois by the petitioner by means of a writ of error, the applicable practice in Illinois.

The defendant in an amended answer to the Complaint in the United States District Court to the suit under the Federal Employers Liability Act raised as its sixth offense the alleged adjudication of employment in intrastate commerce by the Industrial Commission of Illinois. On motion by the plaintiff to strike this defense, the court refused to do so and rendered judgment dismissing the plaintiff's com-

plaint. The Circuit Court of Appeals affirmed the action of the District Court and from that judgment the petitioner appealed to this Court.

SPECIFICATION OF ERROR TO BE URGED.

The Federal Employers Liability Act intended a full recovery for railroad employees engaged in interstate commerce who suffer injury due in whole or in part to the negligence of the employer. Congress never intended to have it deprive interstate employees of assured minimum recovery under local workmen's compensation laws where the accident was not at least in part due to the employer's negligence.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C.I.O.

BRIEF.

The United Railroad Workers of America, C.I.O., has prepared this brief specifically for the purpose of challenging the correctness of the decision in the case of N. Y. CENTRAL v. WINFIELD, 244 U. S. 147 (1916). It is the opinion of this union that the dissenting opinion of the late Mr. Justice Brandeis should now be accepted as the proper decision, particularly because of the amendment of August 11, 1939 to the Federal Employers Liability Act which has extended the coverage of that Act to practically all employees of railroads, regardless of the nature of their employment at the moment of the accident.

In SCARBOROUGH v. P. R. R., 326 U. S. , 66 S. Ct. 93, this union prayed for leave to file a brief, amicus curiae, in that case, as here, because of the recognition of the difficulties encountered by non-operating railroad employees in proving negligence under the Federal Employers Liability Act and the necessity for a liberal approach in decisions measuring the quantum of proof necessary to establish negligence. The petition for Certiorari in that case was denied, with Mr. Justice Black, Mr. Justice Murphy, and Mr. Justice Douglas dissenting. That suit was brought in the United States District Court in Philadelphia only after the Pennsylvania appellate courts had denied jurisdiction of the cause of action under the workmen's compensation laws of Pennsylvania (154 Pa. Super. 129—1943).

The petitioner in that case had early recognized the difficulties that would be encountered in establishing negligence and had, therefore, endeavored to obtain compensation for his injury under the workmen's compensation law which does not require proof of negligence.

Repeatedly, in the last three years, this court has in suits brought under the Federal Employers Liability Act

commented upon the necessity for a Federal workmen's compensation law for railroad employees injured in the course of their employment in interstate commerce. Particularly have these comments been made by those justices of the Supreme Court who would have refused recovery for the injured employee in those cases.

Notwithstanding the fact that for a long time there has been a hue and cry raised by railroads throughout the country for such an act and by trial judges in the United States Courts, see RAUDENBUSH v. B. & O. R. CO., 63 F. Supp. 329, E. D. Pa. 1945, the Congress of the United States has consistently refused to pass a workmen's compensation act to take the place of the Federal Employers Liability Act. The reason for this must be self-evident. The purpose of the Federal Employers Liability Act was to provide the injured railroad employee engaged in interstate commerce with a recovery *over and above* what he would be entitled to under the local workmen's compensation laws. The measure of recovery provided by workmen's compensation laws throughout the country necessarily is small and it provides for only a small portion of the average weekly wage lost by the injured employee as a result of the accident, with nothing for pain and suffering, and only limited responsibility for medical care and attention.

The Congress of the United States obviously felt that, where an accident was caused in whole or in part by negligence on the part of the railroad, the employee should not be deprived of *any* part of his earnings, and that he should be paid for his pain and suffering and provided with adequate medical care and attention for so long as his disability continued. This seems to be a logical and fair approach to the problem.

In fairness to the railroad, the act, as passed, allowed the railroad credit for so much of the injury as could be attributed to negligence on the part of the employee.

The title of the Act itself says,

> "An act relating to liability of common carriers by railroads to their employees in certain cases."

This title, when compared with a bill, not passed but proposed by the Employers Liability and Workmen's Compensation Commission, which read:

> "A bill to provide *an exclusive remedy* and compensation for accidental injuries resulting in disability or death to employees of common carriers by railroads engaged in interstate or foreign commerce. * * *"

Sen. Doc. 338, P. 107, 62nd Cong., 2d Sess., indicates clearly that the latter was intended to be an exclusive remedy, whereas, the Federal Employers Liability Act was never intended to be an exclusive remedy for injuries sustained by railroad employees in interstate commerce.

The argument that we seek to advance in support of this proposition has been, however, adequately argued and best presented by the dissenting opinion of the late Mr. Justice Brandeis in the case of N. Y. CENTRAL R. R. v. WINFIELD, supra, and need not be further discussed here at this time.

This union, however, on behalf of several million non-operating railroad employees must now reiterate what it said in its petition for certiorari in the SCARBOROUGH case, supra. We there pointed out the difficulties of establishing negligence in suits brought under the Federal Employers Liability Act by non-operating employees. That we had such a problem in the SCARBOROUGH case is self-evident from the decision that ultimately followed in that case. That that problem is presented constantly in other cases of like character may easily be determined by a review of the decisions rendered throughout the country in state courts and lower federal courts repeatedly denying recovery.

These employees are being left without remedy of any character for serious injuries sustained in the course of

their employment. We have no intention, on behalf of this union, to deprive operating employees of what they are justifiably entitled to in the way of remedies provided by the Federal Employers Liability Act where negligence can be established, *nor have we any desire to have a federal workmen's compensation act passed by Congress for the benefit of our employees.* We feel that there should be a minimum remedy under local workmen's compensation laws for railroad employees injured in interstate commerce, plus a right of action under the Federal Employers Liability Act where the injury was due in whole or in part to the negligence of the railroad. All of this can be achieved by now adopting the dissenting opinion of the late Mr. Justice Brandeis in the WINFIELD case, supra. We believe Congress so intended.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
B. NATHANIEL RICHTER,
Counsel for United Railroad Workers of America, C.I.O. Amicus Curiae.